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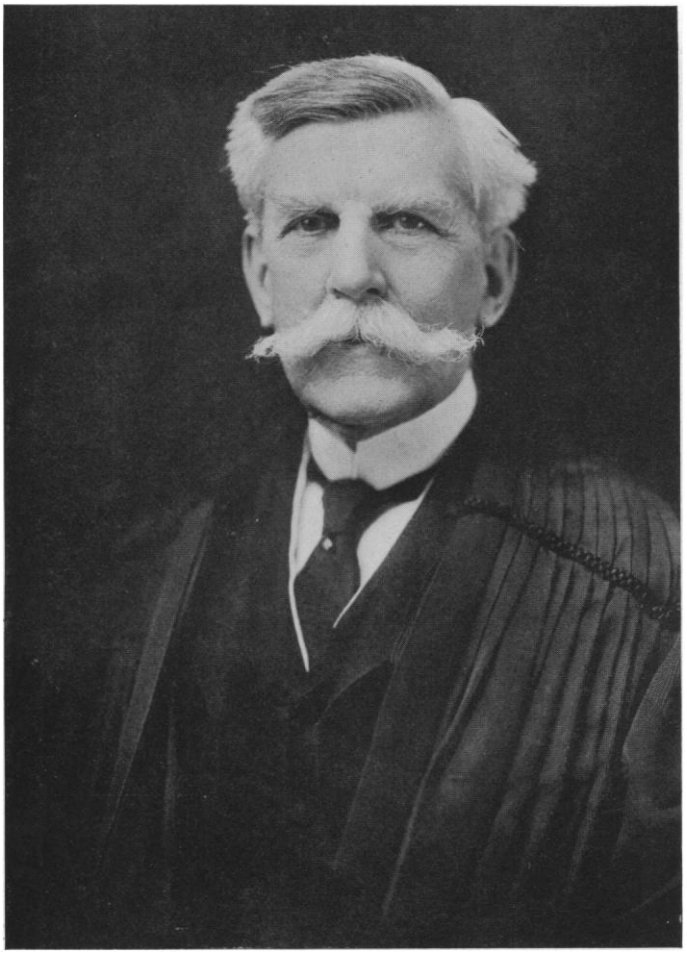
JUDGE HOLMES'S CONTRIBUTIONS TO THE SCIENCE OF LAW

IN the preface to his recently published "Collected Papers," [1] Mr. Justice Holmes reminds us that a later generation has carried on the work which he began nearly half a century ago. His ideas have so thoroughly entered into the substance of our legal thought, and the papers and addresses in which they were set forth are so buried in the periodical literature of the law that the epigoni could easily forget whose armor they were wearing and whose weapons they were wielding. The papers and addresses entitled "Agency" (1891), "Privilege, Malice and Intent" (1894), "Learning and Science" (1895), "The Path of the Law" (1897), and "Law in Science and Science in Law" (1899) for the most part are addressed directly to problems of immediate importance in the law of today, and might have been written in the second decade of the twentieth century instead of the last decade of the nineteenth. Rereading them consecutively in their new form and remembering the dates of their original publication, one can but see that their author has done more than lead American juristic thought of the present generation. Above all others he has shaped the methods and ideas that are characteristic of the present as distinguished from the immediate past.

Comparing twentieth-century science of law in America with the legal science of the last quarter of the nineteenth century, the most

[1] COLLECTED LEGAL PAPERS by Oliver Wendell Holmes, New York, Harcourt, Brace and Howe, 1920, pp. vii, 316.



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significant changes are, the definite break with the historical method; the study of methods of judicial thinking and understanding of the scope and nature of legal logic; recognition of the relation between the law-finding element in judicial decision and the policies that must govern lawmaking; conscious facing of the problem of harmonizing or compromising conflicting or overlapping interests; the pulling apart and setting off of the several conceptions involved and concealed in the protean term "a right;" faith in the efficacy of effort to improve the law and make it more effective for its purposes; a functional point of view in contrast with the purely anatomical or morphological standpoint of the last century; giving up of the idea of jurisprudence as a self-sufficient science, and unification of the methods each of which formerly claimed exclusive possession of the whole field. In each of these respects the present book testifies that Mr. Justice Holmes anticipated the teachers and thinkers of today from twenty to thirty years.

Compare Carter's "Law: Its Origin, Growth and Function" [2] with the paper on "Agency." [3] The former is written wholly from the metaphysical-historical standpoint of the seventies and eighties. It assumes that legislation is a futile attempt to make what cannot be made, that law is something which may only grow and is not to be shaped consciously. It employs an ethical-idealistic interpretation of legal history. It seeks to deduce everything from and measure everything by a metaphysically given ultimate datum of individual free self-assertion. The latter has already parted ways with the then dominant historical school and has done so after developing the best possibilities of its method.[4] It has seen through the dogmatic fiction of representation, by which men were seeking to reconcile employer's or principal's liability with the rising juristic principle of no liability without fault, and has pointed out the policy behind the fiction and the historical process of its development.[5] It conceives of historic continuity with the past, not as a duty, but at most as a condition of effective use of the materials with which we must work.[6] Also in the address "The Path of the

[2] Published 1907, written 1904–1905.
[3] pp. 49–116, published 1891.
[4] See also the paper "Early English Equity."
[5] See pp. 49, 50, 54, 58–59, 87, 89, 93.
[6] See also, "Learning and Science," 139.

Law,"[7] with the assurance of a master of historical method, the functional use of legal history is illustrated; we are shown what is behind particular legal traditions, what their course of development has been, and how we may use them intelligently for the ends of today instead of remaining slaves to them.[8] Its author had long ago rejected the idea of a statute as a temporary excrescence on the Corpus Juris, to be ignored for historical purposes, which grew out of judicial reaction from the legislative reform movement of the first half of the nineteenth century.[9]

Geny's *Méthode d'interprétation* [10] is commonly put as a landmark. But years before it appeared Mr. Justice Holmes had begun to study legal method, had called attention to the modes of judicial thought and had anticipated the main ideas of today.[11] Throughout the last century analytical and historical jurists were agreed on a complete separation between jurisprudence and the theory of legislation and professed to exclude all ideas of policy from the domain of legal thought.[12] Mr. Justice Holmes was already well aware of the relation between law-making policy and the shaping of law through judicial decision and of the actual process which goes on more or less subconsciously under the name of legal logic and finding of the law.[13] Yet he had too firm a grasp of the problem of the legal order to go to the other extreme of advocating the putting of judicial action wholly at large, as did the "progressives" of two decades ago who would have made of precedents no more than a "flickering light" to guide the judge when uncertain what he desired to do. The proposition that a decision is only evidence of the law, that the rule existed logically or potentially theretofore and was but found, is not a purposeless fiction. It serves to maintain

[7] pp. 167–202.

[8] See pp. 192, 193. Cf. "Law in Science and Science in Law," 226–227.

[9] p. 67. Compare with Carter's attitude the way in which Coke's Second Institute develops legal doctrine on the basis of the legislation of Edward I. Yet the former assumes that his is the immemorial common-law position.

[10] 1 ed. 1899.

[11] See a statement of these by the other leader of American legal scholarship, in WIGMORE, PROBLEMS OF LAW (1920). Compare HOLMES, COLLECTED PAPERS, pp. 8, 101, 104, 180, 181.

[12] HOLLAND, JURISPRUDENCE, chap. 1; MAINE, EARLY HISTORY OF INSTITUTIONS, chap. 12; POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 1 ed. I, xxiii.

[13] See particularly the paper, "Privilege, Malice and Intent," pp. 117–134; also "The Path of the Law," p. 184.

the social interest in the general security by holding the judicial lawmaker to traditional premises and traditional lines and modes of development. He chooses from among competing legal analogies by a traditional technique, and the rôle of legislative policy is in determining his choice within restricted limits.[14]

Again, as early as 1894 Mr. Justice Holmes had given up the form of legal science that sought only to put a historical or philosophical foundation under existing doctrines,[15] and instead of deductions from liberty, was thinking of harmonizing and compromising conflicting or overlapping interests and of the valuing of interests which that process presupposes.[16] He had seen into the pseudo-concept of "a right" and begun the process of setting off the several conceptions involved in our use of that term long before the present ferment in analytical jurisprudence in America.[17] While the fashion was to add a positivist doctrine of juristic futility to the historical doctrine of legislative futility, he had borne testimony to his faith in the efficacy of effort.[18] While it was still the fashion to thrash over the barren straw of the controversy as to the nature and definition of law, he was looking at the legal order functionally.[19] As early as 1895 he had given up the ideas of jurisprudence as a self-sufficient science, of law as something to be measured by itself or judged by a critique derived from itself, and of legal rules and doctrines as resting on their own basis.[20] That he should have urged unification of the methods of jurisprudence as early as 1897, when it was still assumed that some one true method was the one key to social and legal science, was but a corollary.[21]

If the ambiguity of the term "law" that requires us to use one word for the legal precepts which are actually recognized and applied

[14] As he said elsewhere, judicial making of law is "interstitial."

[15] "I am not trying to justify particular doctrines, but to analyze the general method by which the law reaches its decisions." P. 122.

[16] See also pp. 231, 288.

[17] "Privilege, Malice and Intent," *e. g.* pp. 120–121.

[18] "The time has gone by when law is only an unconscious embodiment of the common will." P. 130. See also p. 230. Compare CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 203; CENTRALIZATION AND LAW, 23 (1906).

[19] "The Path of the Law." Compare CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 131: "Statically regarded law is custom, when dynamically it is the force acting in harmony with custom and compelling obedience to it."

[20] "Learning and Science," *e. g.* p. 139.

[21] "The Path of the Law," *e. g.* p. 198. Compare WARD, PURE SOCIOLOGY, 12–14 (1902).

in the tribunals of a given time and place and for the more general body of doctrine and tradition from which those precepts are chiefly drawn and by which we criticize them, if the longevity of scholastic logic in law after other sciences have given it up and the assumption that application of a rule of property and of a standard of conduct are one and the same process, — if these things have seemed to give the juristic charlatan an opportunity for pettifogging criticism, the author of "The Path of the Law," and of the dissenting opinion in *Lochner* v. *New York*,[22] may await the assured verdict of time.

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[22] 198 U. S. 45, 75 (1905).